

Supreme Court, U. S.

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No. 77-652

MICHAEL PODAK, JR., CLERK

In the Supreme Court of the United States
OCTOBER TERM, 1977

LEWIS NATHANIEL DIXON, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT*

MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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**MEMORANDUM FOR THE UNITED STATES
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Petitioner contends that the warrantless search of a paper bag containing heroin that was recovered from his car at the time of his probable cause arrest violated the Fourth Amendment.

After a jury trial in the United States District Court for the Northern District of California, petitioner was convicted of possession of heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1), and of carrying a firearm unlawfully during the commission of a felony, in violation of 18 U.S.C. 924(c)(2). He was sentenced to consecutive terms of 15 and ten years' imprisonment, to be followed by a special ten-year parole term, and was fined \$25,000. The court of appeals affirmed (Pet. App. A; 558 F. 2d 919).

1. The evidence at trial showed that on September 18, 1975, petitioner agreed to sell a pound of heroin for \$12,000 to Willie Hudson, an informant who had previously purchased heroin from petitioner (Tr. 80, 83, 88, 96-98, 116, 117, 179-180, 183). With Hudson's consent, agents of the Drug Enforcement Administration recorded his oral agreement with petitioner (Tr. 84-85). Thereafter, Hudson and petitioner arranged in a recorded telephone conversation to meet later that afternoon at a specified location to consummate the heroin deal (Tr. 117, 121-125, 191). D.E.A. Agents Robert Michelotti and William Ruzzamenti instructed Hudson to meet with petitioner as planned and to signal them if petitioner had the heroin in his possession (Tr. 126, 192-193).

Hudson drove to the rendezvous with petitioner under the surveillance of Agents Michelotti and Ruzzamenti, who parked about one-half block away (Tr. 194). When petitioner arrived a few minutes later, Hudson knelt down on the sidewalk outside the open window of petitioner's car and engaged him in conversation, during which Hudson noticed a brown paper bag containing heroin inside the car (Tr. 131, 194-195). At this point, Hudson gave the prearranged signal to the surveilling agents; they immediately moved in and arrested petitioner while he was still sitting behind the wheel of his car (Tr. 237). Agent Michelotti ordered petitioner to get out of the car. As petitioner did so, the agent noticed a gun and brown paper bag on the floorboard on the driver's side of the front seat (Tr. 237-242). As soon as petitioner had been frisked for weapons and handcuffed, Agent Ruzzamenti seized the loaded gun and the bag, which contained heroin (Tr. 205-207).

2. Although petitioner concedes (Pet. 4) that there was probable cause for his arrest, he argues (Pet. 5-10) that the agents' warrantless search of the paper bag and seizure of the narcotics was contrary to this Court's ruling in *United States v. Chadwick*, No. 75-1721, decided June 21, 1977. *Chadwick*, however, involved a warrantless, probable cause search of a double-locked footlocker, conducted at the offices of the Drug Enforcement Administration an hour and a half after the defendants had been arrested elsewhere for possession of contraband. *Chadwick* involved neither the "automobile exception" to the warrant requirement (*Carroll v. United States*, 267 U.S. 132) nor the existence of any exigent circumstances at the time of the search. *United States v. Chadwick*, *supra*, slip op. 2, 10. Moreover, the search in *Chadwick* was not incident to defendants' arrest because it "was conducted more than an hour after federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody." *Id.* at 13.

Here, unlike the situation in *Chadwick*, the paper bag containing heroin was recovered from petitioner's automobile and inspected at the scene of his arrest (a "dead end street" in a "very low income" area (Tr. 193, 195)), just after petitioner had been removed from the car, frisked and handcuffed, and at a time when there were five to ten people in the area, including a known heroin addict, who apparently were aware that the situation involved drugs (Tr. 127, 129, 176, 191-195). The need for an immediate search was further heightened by the fact that a gun was lying on the floor of the car next to the paper bag. This was, in short, a situation in which "the person arrested may seek to use a weapon, or *** evidence may be concealed or destroyed." *United States v. Chadwick*, *supra*, slip op. 12. See *Chimel v. California*, 395 U.S. 752, 763. Therefore, as the court below held (Pet. App. A), the search and seizure were lawful as incident to petitioner's arrest.

Alternatively, the warrantless search of the paper bag taken from petitioner's car was within the automobile search doctrine. See *United States v. Chadwick, supra*, slip op. 10-11; *Texas v. White*, 423 U.S. 67, 68; *Chambers v. Maroney*, 399 U.S. 42, 48; *United States v. Soriano*, 497 F. 2d 147 (C.A. 5) (*en banc*), certiorari denied *sub nom.* *Aviles v. United States*, No. 76-5132, June 27, 1977.¹

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. McCREE, JR.,
Solicitor General.

JANUARY 1978.

¹Since the agents had probable cause to believe that the automobile had been used to transport narcotics, it could also have been seized for forfeiture (21 U.S.C. 881(a), 881(b)) and searched without a warrant under *Cooper v. California*, 386 U.S. 58.